No. 83-1656

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BERTOLD J. PEMBAUR,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTION PRESENTED

WHETHER THE INDIVIDUAL STATES, IN INTERPRETING THEIR OWN OBSTRUCTING OFFICIAL BUSINESS STATUTES, MAY PROVIDE THAT AN OCCUPANT OF A BUSINESS PREMISE, ABSENT BAD FAITH ON THE PART OF A LAW ENFORCEMENT OFFICER, MAY NOT OBSTRUCT THAT LAW ENFORCEMENT OFFICER IN THE PERFORMANCE OF HIS DUTY, WHETHER OR NOT THE OFFICER'S ACTIONS ARE LAWFUL UNDER THE CIRCUMSTANCES?

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OPINIONS BELOW

The opinion of the Ohio Supreme Court at issue here is reported as *State* v. *Pembaur*, 9 O.S.3d 136, 459 N.E.2d 217 (1984). This opinion is also set forth as Appendix A herein. The earlier opinions of the Ohio Supreme Court and the Ohio Court of Appeals are accurately set forth in the brief of the petitioner.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on February 8, 1984. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

The Fourth Amendment of the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section One of the Fourteenth Amendment of the Constitution of the United States provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2921.31 of the Ohio Revised Code provides:

> (A) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.
>
> (B) Whoever violates this section is guilty of obstructing official business, a misdemeanor of the second degree.

Section 2921.01 (L) of the Ohio Revised Code provides:

> As used in the Revised Code:
>
> • • •

(L) "Privilege" means an immunity, license, or right conferred by law, or bestowed by express or implied grant, or arising out of status, position, office, or relationship, or growing out of necessity.

Section 2935.12 of the Ohio Revised Code provides:

When making an arrest or executing a warrant for the arrest of a person charged with an offense, or a search warrant, the officer making the arrest may break down an outer or inner door or window of a dwelling house or other building, if, after notice of his intention to make such arrest or such search, he is refused admittance, but an officer executing a search warrant shall not enter a house or building not described in the warrant.

STATEMENT OF THE CASE

a) Procedural Posture:

On December 5, 1977, petitioner Pembaur was convicted of Obstructing Official Business in the Hamilton County, Ohio, Court of Common Pleas. This conviction was reversed on February 12, 1981, by the Ohio First District Court of Appeals. On February 3, 1982, the Ohio Supreme Court reversed and remanded for rehearing. On November 11, 1982, the First District Court of Appeals again reversed petitioner's conviction. On February 8, 1984, the Ohio Supreme Court reversed the decision of the Court of Appeals and reinstated petitioner's conviction. From this ruling, petitioner has instituted the pending Petition for Writ of Certiorari to the Ohio Supreme Court.

b) Facts:

On May 19th, 1977, Deputy Sheriff Frank Webb and Deputy Sheriff David Allen went to the Rockdale Medical

Center looking for a Kevin Maldon and a Marjorie McKinley. The Rockdale Center is located in the Avondale area of Cincinnati, and is operated by petitioner Bertold Pembaur. Webb and Allen had in their possession capiases authorizing them to arrest Maldon and McKinley. (Exhibits #1 and #2 at trial). These bench warrants were issued after a hearing in open court.

The capiases recited that both Maldon and McKinley had been lawfully served with subpoenas to appear before the Grand Jury, and that each of them had failed to appear. The capiases then recited the following language:

> "It is therefore ordered, by the court that a Capias be issued for the arrest and detention of said witness (Maldon and McKinley) until further order of this Court.
>
> TO THE SHERIFF OF HAMILTON COUNTY, OHIO:
>
> Upon receipt of a certified copy of this Entry Ordering Capias Issued for Witness, you are hereby commanded to take and to bring this Court the witness (Maldon and McKinley) . . . to answer for contempt in failing or refusing to obey the command of a subpoena lawfully served on him in the within cause."

Webb and Allen arrived at the Rockdale Medical Center at about 2:00 p.m. on May 19th, 1977. (R. 323) Both Marjorie McKinley and Kevin Maldon worked at that location, and of course the officers were arriving during regular business hours.[1]

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[1] On appeal the validity of these bench warrants was challenged by defendant. The second Court of Appeals decision did not determine this issue holding that the validity would not affect their holding. Thus the appellate decision assumed for purposes of argument that the capiases were validly issued. The original appellate ruling was that the capiases were properly issued.

The Rockdale Medical Center is a medical clinic, operated by petitioner Pembaur, and is open to the public. Webb and Allen entered by the front door and went into a general reception room. Deputy Allen approached the receptionist, gave his name and asked to speak to a Mrs. Marjorie McKinley. (R 391) The receptionist went to another woman, who fit the description of Marjorie McKinley (R. 391) and spoke to her. (Officers Webb and Allen had been given a description of McKinley, R 321). The receptionist returned and asked Allen who he was. Allen replied that he was a police officer and displayed his badge. The receptionist relayed this information to the other woman who was apparently McKinley (R 392), and this woman immediately retreated into the interior of the building. (R 392) Webb and Allen repeatedly identified themselves as police officers, explained why they were there and showed the capiases; first to the receptionist and then to the petitioner Pembaur, who had arrived on the scene. Pembaur refused to allow the officer to enter the major portion of the Medical Center to look for and arrest McKinley and Maldon, in fact Pembaur barred the officers by wedging the door shut with a 2 x 4.

Pembaur informed the officers that the capiases were illegal and that the judge had no business signing them. (R 393) Pembaur then asked the officers to leave the premises. Pembaur further stated that no one would get in until he spoke to his attorneys. (R 393) Meanwhile, Pembaur had summoned the Cincinnati Police and local news media to his office. When the Cincinnati Police arrived, Pembaur told them to remove the county officers for "trespassing." (R 434) The Cincinnati officers explained to Pembaur that the Sheriff's deputies were properly there to execute the capiases, and at that point the petitioner ordered the Cincinnati officers off the premises. (R 435)

For approximately two hours Pembaur barred the officers from looking for Maldon and McKinley, both of whom were in the building. [In fact, defendant concealed McKinley and Maldon in the building (R 526-7), and the police eventually left empty handed.] At about 4:00 p.m. after trying to reason with Pembaur for two hours, the police officers broke down the door and looked unsuccessfully for McKinley and Maldon. This is the incident which gave rise to count six of the indictment, and which is involved in the present action.

The Court of Appeals twice reversed and discharged the defendant. The basis for their ruling was a determination that capiases, and also arrest warrants issued on probable cause, cannot be executed by police on the business premises of a third party without first obtaining a search warrant. From this premise, the appellate Courts reasoned that the defendant was "privileged", as that term is used in the Obstructing Official Business statute,[2] to interfere with the police officers seeking to make the arrests.

The Ohio Supreme Court reinstated the petitioner's conviction, holding that there was no right to obstruct officers in the performance of their duties, when they are acting in good faith under color of law. The syllabus paragraph of the Ohio Supreme Court, which states the law of the case in Ohio, reads as follows:

> "Absent bad faith on the part of a law enforcement officer, an occupant of business premises cannot obstruct the officer in the discharge of his duty, whether

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[2] R.C. 2921.31 Obstructing Official Business

(A) No person, without privilege to do so and with purpose to prevent, obstruct or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.

or not the officer's actions are lawful under the circumstances."

From this ruling the petitioner has initiated the present action in this Court.

REASONS FOR DENYING THE WRIT

THE DECISION OF THE OHIO SUPREME COURT IS IN CONFORMANCE WITH A WELL RECOGNIZED RULE OF LAW, AND IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR WITH DECISIONS OF THE FEDERAL COURTS OF APPEALS.

The decision of the Ohio Supreme Court which petitioner challenges here, simply restates a well recognized rule of law, i.e., that where a police officer, in good faith, is attempting to enforce a Court order on a business premise, that he is not required to debate the legality of that court order with anyone who cares to intervene and that active interference with such an officer in the performance of his duty is a violation of the State Obstructing Official Business statute. (R.C. 2921.31) Defendant insists that he does have the right to interfere. In sum, defendant seeks to resurrect the old "right to resist" rule, which allowed citizens to forcibly resist police actions which they deemed improper, with the citizen running the risk of criminal charges if his legal judgments are not sound.

The source of the old "right to resist" rule can be found in *John Bad Elk* v. *United States,* 177 U.S. 529 (1900). The justification for the rule was the inordinate amount of time that arrestees would spend in jail in those days prior to trial. Such reasons no longer exist. Today the fast

processing between arrest and appearance before a judge negatives the need for such a rule, and in fact there are many valid reasons for abandoning it. Quick access to bail is of course the primary reason. Secondly, the exclusionary rule operates to protect a person from the fruits of an illegal arrest or an illegal search. Thus, there is no need for physical resistance in this regard. Petitioner argues that the exclusionary rule gives a person in his position no relief, since it only protects the criminal, and not someone like him who merely actively prevented police entry. This argument totally ignores the fact that defendant can seek civil redress for damages if the police conduct is as egregious as he complains. (This petitioner has demonstrated his awareness of this relief by suing civilly numerous law enforcement personnel.) Perhaps the most important reason for not allowing each citizen to set himself up as a judge to pass on the legality of court process and police action is the violence that can result from such a confrontation. Police are equipped with lethal armament and so are many others. Certainly, such items are readily available in this country. If police officers, armed with a court order, and acting in good faith, must debate the legality of their actions with every contentious person who cares to intervene, two possible results obtain, one, police will become hesitant to carry out their duties, or two, violence will result. Petitioner here seeks to encourage such a result.

In order to discourage the kind of confrontation which resulted here, Ohio has done away with the old "right to resist rule." This is a well settled proposition in Ohio, see *Columbus* v. *Fraley*, 41 O.S. 2d 173, 324 N.E.2d 735 cert. denied. 423 U.S. 872 (1975); *Columbus* v. *Harris*, 44 O.S.2d 89, 338 N.E.2d 530 (1975); *State* v. *Anderson*, 46 O.S.2d 219, 346 N.E.2d 776 (1976); *State* v. *Wenger*,

58 O.S.2d 336, 390 N.E.2d 801 (1979); *State* v. *Pembaur*, 9 O.S.3d 136, 459 N.E.2d 217 (1984). The rule was announced in *Fraley* as follows:

> "In the absence of excessive or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances."

(This Court denied certiorari in *Fraley*.)

The analogy to the present case is apparent, one has as much right to be free from an illegal search as from an illegal arrest, *Dunaway* v. *New York*, 442 U.S. 200 (1979) however, such rights are to be vindicated in the courtroom, not on the streets as petitioner would suggest.

Many other jurisdictions have adopted the same rule as the Ohio rule at issue here, see, for example, *Miller* v. *State*, P.2d 421 (Alaska, 1967); *State* v. *Richardson*, 511 P.2d 263 (Idaho, 1973); *Fields* v. *State*, 382 N.E.2d 972 (Ind. App. 1978); *State* v. *Wright*, 162 S.E.2d 56, (N.C. App. 1968) affd. 163 S.E.2d 897; *United States* v. *Simon*, 409 F.2d 474 (7th Circ., 1969); *Schultz* v. *Lamb*, 416 F.S. 723 (D. Nev. 1973); *United States* v. *Heliczer*, 373 F.2d 241 (2d Cir., 1967).

There can be no doubt that the officers here, whether eventually found to be acting legally or not, were acting in good faith compliance with Ohio law as it existed at that time. The underlying incident here occurred in 1977. At that time, it was beyond cavil that an officer in possession of an arrest warrant could enter a business premise and effectuate an arrest without a search warrant. (R.C. 2935.12 Forcible entry to make an arrest.) Then, in 1981, while this case was still on appeal, this Court

released its decision in *Steagald* v. *United States,* 451 U.S. 204 (1981) holding that a search warrant is necessary in order to effectuate an arrest warrant in a third party home. The Ohio Appellate Courts ruled that the *Steagald* holding also applied to business premises. Short of being clairvoyant, there was no way for the officers involved to anticipate this ruling. It must be noted here that the officers were merely seeking to enforce validly issued bench warrants. They were not making a search. They seized no evidence or property of any kind. Nor was there ever any danger that they would ever look into medical files. They were seeking two people, and nothing else.

On appeal to the Ohio Supreme Court, the state argued that *Steagald* was limited to homes, and did not apply to business premises. The Ohio Supreme Court did not reach this issue, deciding the case as it did on the basis of its previous holding on the "right to resist" rule. Should further briefing of this matter be necessary, the state notes that it has not abandoned its position in this regard.

Petitioner argues in his brief that the Ohio Supreme Court decision here is in conflict with this Court's decision in *District of Columbia* v. *Little,* 339 U.S. 1 (1949). This is incorrect, there is no conflict. *Little* was not a constitutionally based decision. In fact, the Court specifically refused to consider any constitutional issues therein. *Little* was reversed solely on a weight of the evidence ruling. Likewise, there is no conflict with this Court's decision in *Camara* v. *Municipal Court,* 397 U.S. 523 (1967); and *See* v. *City of Seattle,* 387 U.S. 541 (1967). In *Camara,* the defendant was prosecuted for a violation of the city housing code for refusing to allow a warrantless inspection of his home. In *See,* the defendant was charged with refusing to allow an inspection of his warehouse.

This Court specifically took in those cases to reconsider

its previously held opinion that warrantless administrative searches were proper. [See, *Frank* v. *Maryland,* 359 U.S. 560 (1959) and *Ohio, ex rel. Eaton* v. *Price,* 364 U.S. 283 (1960)] In *Camara* and *See* this Court reconsidered its position and held such warrantless searches to be violative of the 4th Amendment. Neither case involved a defendant charged with Obstructing Official Business or an equivalent offense, this issue simply was not before the Court. Further, neither case involved, as does this case, a situation where the officers arrived with an arrest warrant. There can not be a finding of conflict where idential issues are not present.

Defendant also argues that the decision here is in conflict with various decisions of the Federal Courts of Appeals, chiefly *United States* v. *Prescott,* 581 F.2d 1343 (9th Cir. 1978). Again, this claim is without merit. *Prescott* involved the warrantless entry into a home, not a business premise. This is a crucial distinction since the home has always been accorded the highest degree of protection from intrusion. *United States* v. *United States District Court,* 407 U.S. 297 (1972); *United States* v. *Martinez-Fuerte,* 428 U.S. 543 (1976) [If petitioner's position here is correct, then those named in an arrest warrant have greater freedom from arrest at work than they do at home, since an arrest warrant alone will suffice to enter the suspects own home. *Payton* v. *New York,* 445 U.S. 573 (1980)]. Further, the *Prescott* decision indicates that an obstructing charge could lie if more than passive resistance occurred. In this case, petitioner actively barred the door with a 2 x 4 *and* he actively aided in concealing the wanted subjects in the building.

Petitioner also cites to *United States* v. *McKinney,* 379 F.2d 259 (6th Cir., 1967); *Sparks* v. *United States,* 90 F.2d 61 (6th Cir. 1937); and *Miller* v. *United States,* 230

F.2d 486 (5th Cir. 1956) as being in conflict with the present case. *McKinney* is not in conflict. In fact, it upholds the entry into a third party residence, without a search warrant, to effect an arrest. Further, there simply is no issue present in *McKinney* which is remotely in conflict with the decision of the Ohio Supreme Court in the present case. *Sparks* involves a search warrant and the search of a dwelling house, neither of which factors is present in the instant case. There is dicta in *Sparks* concerning resistance to an invalid search warrant, however it is not persuasive, since it implies that the owner of subject premises may determine the probable cause content of a search warrant and resist forcibly its service. In such a situation, the person and officers would act at their peril, with the incorrect party facing criminal charges. Such a result is not tolerable. *Miller,* again, involves a home, not a business premise, and the Court indicated therein that an arrest warrant was all that would be needed to enter therein. As such, there is no conflict with the present case.

Petitioner closes his argument by stating that the Ohio Supreme Court decision here has jeopardized the confidentiality of the relationship between physician and patient. This simply is not so, and has never been an issue in this case. The officers were serving a bench warrant here, not a search warrant. They were looking for people, and there was no danger of them looking into file cabinets in an effort to locate them. Danger to the privacy of medical files is not at issue here.

CONCLUSION

For the reasons set forth above, Respondent respectfully submits that the petition for Writ of Certiorari should be denied.

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APPENDIX

OPINION OF THE SUPREME COURT OF OHIO

(Decided February 8, 1984)

No. 82-1757

THE SUPREME COURT OF OHIO

THE STATE OF OHIO, CITY OF COLUMBUS

STATE OF OHIO,
Appellant,

vs.

BERTOLD PEMBAUR,
Appellee.

[9 Ohio St. 3d 136]

Criminal Law—search and seizure: occupant of business premises cannot obstruct officer in discharging his duty, when; lawfulness of officer's actions irrelevant; R.C. 2921.31(A) violated, when.

Absent bad faith on the part of a law enforcement officer, an occupant of business premises cannot obstruct the officer in the discharge of his duty, whether or not the officer's actions are lawful under the circumstances. (*Columbus* v. *Fraley*, 41 Ohio St. 2d 173 [70 O.O.2d 335], followed.)

APPEAL from the Court of Appeals for Hamilton County.

On May 19, 1977, two Hamilton County sheriff's deputies attempted to serve bench warrants, or capiases, upon two employees of the Rockdale Medical Center. The bench warrants were issued after a hearing in open court. The capiases stated that both parties had been lawfully served with subpoenas to appear before the grand jury, and that each of them had failed to appear. There has been no issue raised to this court as to the validity of the capiases.

The Rockdale Medical Center is a medical clinic operated by defendant, Bertold J. Pembaur, M.D., and is open to the public. The deputies arrived at the medical center during business hours, and the two employees whom they sought were apparently at the center. The officers entered by the front door and went into a general reception room which was also open to the public. After entering the outer office, one deputy sat down in the reception area and the other approached the receptionist, who was in a separate office but visible through a window. The deputy identified himself to the receptionist and stated his business.

The receptionist informed the deputies that they were not permitted to enter the inner office area in order to serve the capiases, and that they should wait for the defendant. Shortly thereafter defendant appeared from somewhere inside the clinic and, with the aid of the receptionist, closed and barred the door leading from the reception area to the inner office. The deputies showed the capiases to defendant and explained their contents. Defendant told the deputies that the papers were illegal and that the judge made a mistake in signing them. Defendant stated that he was going to call the police, as well as his attorney.

Two Cincinnati police officers arrived within several

minutes. They tried to explain the nature of the capiases to defendant and his duty to obey them. Defendant continued to contend that the capiases were illegal and asked the officers to wait until his attorney arrived. After several other police officers [137] were on the scene and the group had waited approximately two hours, the deputies broke through the office door with an axe. Once inside, they were unable to locate either of the individuals named in the bench warrants.

Defendant was charged, along with two other employees, with obstructing official business, pursuant to R.C. 2921.31 (A). This charge, count six of the indictment, was severed from the five other charges against defendant. The case was tried to a jury, which returned a verdict of guilty.

The court of appeals reversed defendant's conviction, but this court vacated that decision and ordered a rehearing. See *State* v. *Pembaur* (1982), 69 Ohio St. 2d 110 [23 O.O. 3d 159]. The court of appeals issued a second decision, again reversing defendant's conviction.

The court of appeals held that defendant was privileged, under R.C. 2921.31 (A), to exclude the deputies from his office, as he was protected against unreasonable searches and seizures by the Fourth Amendment to the United States Constitution. That court noted that an arrest warrant does not give an officer authority to enter the home of a third party, absent consent or exigent circumstances, in order to find the subject of the warrant. *Steagald* v. *United States* (1981), 451 U.S. 204. The court reasoned that a private office was no different for search warrant purposes than a private home, citing *Mancusi* v. *DeForte* (1968), 392 U.S. 364. The court concluded that defendant was privileged to exclude the deputies from his office unless and until they obtained a search warrant. That

court also found error in the instruction concerning privilege which had been given to the jury.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

Simon L. Leis, Jr., prosecuting attorney, *Mr. William E. Breyer, Mr. Leonard Kirschner* and *Mr. Bruce S. Garry*,, for appellant.

Messerman & Messerman Co., L.P.A. and *Mr. Gerald A. Messerman*, for appellee.

REILLY, J. The key issue presented in this case is whether a person may obstruct a law enforcement officer in the discharge of that officer's duty, when the person believes that the officer's conduct is unlawful. The state contends that this court should hold that a capias or an arrest warrant includes the authority to enter the business premises of a third party when the officer reasonably believes the subject named in the warrant will be found therein. Nothwithstanding, it is not necessary to determine the authority conferred by a capias in this appeal, nor to announce the broad rule of law urged by the state.

It is noteworthy that the rationale of the United States Supreme Court in *Steagald, supra*, is equally persuasive concerning the contrast of a private business premises to a private home. *Steagald* addressed the rights of a third party, not named in the arrest warrant, to be free from an unreasonable search and seizure in his home, and held that this right is not accorded adequate protection by the issuance of an arrest warrant for the person named [138] in the warrant. Hence, *Steagald* represents the proposition that, absent consent or exigent circumstances, a search warrant must be obtained in order to seek out the subject of an arrest warrant on the property of a third party.

Nonetheless, this appeal does not involve a conviction

based upon the fruits of a warrantless search, such that the legality of the search must be analyzed. Instead, the conviction in question is based upon the conduct of defendant prior to any such search. Therefore, *Steagald* is not controlling in this case.

Defendant was convicted under R.C. 2921.31 (A), which reads as follows:

"No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties."

Unquestionably, defendant impeded the deputies in their attempt to execute the capiases. The question, as the court of appeals correctly determined, was whether defendant was privileged to do so.

The crux of this case is the applicability of *Columbus* v. *Fraley* (1975), 41 Ohio St. 2d 173 [70 O.O. 2d 335]. There we held in the third paragraph of the syllabus that:

"In the absence of excessive or unnecessary force by an arresting officer, a private citizen may not use force to resist arrest by one he knows, or has good reason to believe, is an authorized police officer engaged in the performance of his duties, whether or not the arrest is illegal under the circumstances."

In altering the common-law rule granting a person the right to resist an unlawful arrest, the *Fraley* court deemed it preferable, considering the crunch of modern society, to resolve questions concerning the legality of police conduct in the courts through peaceful means rather than on the street in potentially violent confrontation. *Fraley* is determinative in the present case. Although defendant may well successfully challenge the use against him of any evidence obtained by the deputies in their search for de-

fendant's employees, defendant was not privileged to physically impede the deputies in their attempt to locate the subjects of the capiases.

This, of course, is not to hold that law enforcement officials can freely execute capiases and arrest warrants on third-party premises. A warrantless entry, as in this case, may quite possibly result in the exclusion of pertinent incriminating evidence observed in such entry, and the showing of unreasonable conduct by a law enforcement officer may well provide a privilege to resist the entry by the occupant. Nevertheless, absent bad faith on the part of a law enforcement officer, an occupant of business premises cannot obstruct the officer in the discharge of his duty, whether or not the officer's actions are lawful under the circumstances. The facts in this case do not show bad faith on the part of the deputies, or any other circumstances which would provide a privilege on the part of defendant to obstruct the deputies in the discharge of their duties.

[139] While the court of appeals also held that the trial court's instruction on privilege was inadequate and improper, a review of the charge, considering the issue presented by this case, shows that such charge was not erroneous. The term "privilege" is defined by R.C. 2901.01 (L), and the instruction which was given quoted the statutory definition. Such instruction was sufficient to allow the jury to determine whether defendant was privileged to act under R.C. 2921.31 (A). This is so because *Fraley* stated that the legality of the police action, absent excessive force, is not a factor to consider when determining whether a privilege to resist exists.

For the foregoing reasons, the judgment of the court of appeals is reversed.

Judgment reversed.

CELEBREZZE, C.J., SWEENEY, HOLMES, and C. BROWN, J.J. concur.

LOCHER, J. concurs in judgment only. W. BROWN, J. dissents.

REILLY, J., of the Tenth Appellate District sitting for J. P. CELEBREZZE, J.

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